

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION**

IN RE)
)
JAN M. BERKOWITZ) **Chapter 11**
) **Case No. 15-50673**
)
Debtor)

MOTION FOR RELIEF FROM THE AUTOMATIC STAY

McGuireWoods LLP (“McGuireWoods”) in support of its Motion for Relief from the Automatic Stay, states as follows:

Jurisdiction and Venue

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. Venue is proper pursuant to 28 U.S.C. § 1409.
3. The statutory basis for the relief requested are 11 U.S.C. §§ 362(d), 506 and 553

and Federal Rules of Bankruptcy Procedure 4001(a) and 9014.

Background

4. Prior to the Petition Date, McGuireWoods represented the Debtor in a lawsuit entitled Transasia Commodities Investment Limited v. Newlead JMEG, LLC, Newlead Holdings Limited, Michael Zolotas and Jan Berkowitz that was pending in The Supreme Court of the State of New York, County of New York, Index No. 654414/2013 (Ramos, J.) (the “Civil Action”).

5. Attached hereto as Exhibits A and B respectively are copies of the March 23, 2015 and June 18, 2015 engagement letters between McGuireWoods and the Debtor.
6. In connection with the engagement letters, McGuireWoods received retainer payments totaling \$60,000.00.

7. McGuireWoods continues to hold the retainer payments.

8. In connection with the Civil Action, McGuireWoods, prior to the Petition Date, rendered legal services and incurred expenses in connection with its representation of the Debtor for the period ending September 30, 2015 totaling \$352,303.00 in fees and \$9,354.29 in expenses.

9. On October 12, 2015 (the "Petition Date"), the Debtor filed a chapter 11 bankruptcy petition in this Court, Case No. 15-50673.

Relief Requested

10. The common law right of setoff "allows parties who owe mutual debts to each other to assert the amounts owed, subtract one from the other, and pay only the balance. *See J.B.I. Indus., Inc. v. Suchde*, 99 Civ. 12435 (AGS), 2000 U.S. Dist. LEXIS 11885, at *29-30 (S.D.N.Y. Aug. 17, 2000). Setoff is recognized as long as the debts owed between the parties are owed between the same persons and in the same right.

11. In the instant matter, the Debtor is indebted to McGuireWoods for unpaid legal fees and expenses. At the same time, McGuireWoods holds \$60,000.00 in retainer funds to be applied to those fees and expenses.

12. Since the same creditor entity and the same debtor entity are indebted to each other, McGuireWoods, outside of the Debtor's bankruptcy case, would have the right under applicable non-bankruptcy law to apply the retainer against amounts owed to McGuireWoods by the Debtor.

13. Bankruptcy Code § 553 preserves any setoff rights a creditor may have under other applicable law. *See Official Committee of Unsecured Creditors v. Manufacturers and Traders Trust Co. (In re Bennett Funding Group, Inc.)*, 146 F.3d 136, 138-39 (2nd Cir. 1998).

Thus, to the extent Creditor has the right under law to setoff amounts due the Debtor, § 553 recognizes such rights. In addition, under 11 U.S.C. § 506(a), an allowed claim is considered a secured claim to the extent the creditor has the right to setoff against such claim amounts owed to the debtor.

14. Although § 553 is clear that a creditor's setoff rights are recognized and enforceable under the Bankruptcy Code, any action by a creditor to setoff a debt owing to the debtor that arose prior to the debtor's filing of its bankruptcy petition against a debt owed by the debtor is subject to the automatic stay. 11 U.S.C. § 362(a)(7). Pursuant to 11 U.S.C. § 362(d)(1), however, a bankruptcy court may grant a party relief from the automatic stay for "cause." Since "cause" is not defined in the Bankruptcy Code, whether relief should be granted is to be determined based on the facts of each case. *See In re Mazzeo*, 167 F.3d 139, 142 (2d Cir. 1999).

15. In the instant case, there will be no prejudice to the Debtor if McGuireWoods is granted relief from the automatic stay to apply the retainer. *See Stephenson v. Salisbury (In re Corland Corp.)*, 967 F.2d 1069, 1076 (5th Cir. 1992) (holding that although § 362(a)(7) stays any action to effectuate setoff, §362(a)(7) is only intended to further the Bankruptcy Code's policy of an orderly liquidation and is not intended to defeat setoff rights). Accordingly, "cause" exists under § 362(d)(1) to grant McGuireWoods relief from the automatic stay.

WHEREFORE, McGuireWoods respectfully requests the Court to enter an order granting McGuireWoods relief from the automatic stay so that McGuireWoods may pursue its rights under applicable non-bankruptcy law as regards to the retainer and granting any other additional relief the Court finds justified under the circumstances.

This the 29th day of October, 2015.

/s/ Robert H. Pryor

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on October 29, 2015 a copy of the foregoing **MOTION FOR RELIEF FROM THE AUTOMATIC STAY** has been served electronically or by mailing a copy thereof, first class U.S. Mail or International, postage prepaid to the following:

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